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NO._____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1984

ALWIN E. HOPFMANN, GREGORY HESSION,
CLARENCE PERKINS, CLARENCE PAULIN,
and BETH SULLIVAN,

Appellants,

v.

MICHAEL JOSEPH CONNOLLY,
FRANCIS X. BELLOTTI, CHESTER G. ATKINS,
and THE DEMOCRATIC STATE COMMITTEE OF
MASSACHUSETTS,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE FIRST CIRCUIT

Jurisdictional Statement

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QUESTIONS PRESENTED

1. Is the unanimous decision of this Court in Smiley v Holm, 285 US 355 (1932, opinion by Mr. Chief Justice Hughes,) overruled?

2. Where a state legislature passes a law revoking authority previously delegated to political parties to hold a pre-primary convention and endorse a candidate for United States senator, who thereby becomes entitled to ballot access at the ensuing primary, may a small group of the members of the political party nonetheless exercise a right of Freedom of Association emanating from the First Amendment, following the ruling of this Court in Democratic Party of U.S. v

Wisconsin, 450 US 107, and pre-empt and nullify that revocation so as to re-establish, against the desires of the legislature, that pre-primary convention and give it powers to exclude otherwise qualified candidates from the ballot in the manner of the "Jaybird" primary in Terry v Adams, 345 US 461?

3. Does the right of Freedom of Association, emanating from the First Amendment, empower a small inner group of a particular association, in this case, a political party, to enforce a claimed right which is not the right of every member of that association or a corresponding right of each member individually, but is rather the right of

that small, inner group to increase its own power at the expense of diminishing the power of the broad membership, contrary to the holdings of this Court in NAACP v Alabama, 357 US 449, and similar cases, with regard to primary elections, a "state function," under the ruling of Smith v Allwright, 321 US 649?

4. Is a State statutory scheme which prescribes a method of primary ballot access in exclusive language pre-empted, under the ruling of this Court in Malone v White Motor Corp., 435 US 497, by a right of Freedom of Association in an inner group of a political party which, allegedly under the authority of Democratic Party of the U.S. v Wisconsin

supra, allows that group to make private rules which then become laws and are added to the state laws to require their plain meaning to be radically changed?

5. Where a legislature, acting pursuant to Art.I,Sec.4,Cl.1, as explicated in Smiley v Holm,supra, makes the place of selection of party nominees for U.S senator the polling places of a statewide primary, may an inner group of a political party, acting pursuant to a right of Freedom of Association, pre-empt those provisions of the State statutory scheme making the polling place the place of electing U.S. senators and make instead the pre-primary convention the place of their election, particularly where,

as here, all candidates save one are eliminated at the convention?

6. Does the pre-emption of state statutes and their provisions in this case violate the rights of plaintiffs-appellants under Art.I, Sec.3, Cl.3, and 42 U.S.C. 1983?

7. Does the pre-emption of state statutes in this case by a privately made law violate appellants' rights under Art.I,Sec.3,Cl.3, and 42 U.S.C. 1983?

8. Does the pre-emption of state statutes in this case by a law made by a party inner group violate appellants' rights under the Equality Clause of the XIVth Amendment by weighting voting in favor of a party elite?

9. Does the pre-emption of the state statutes here violate the right of the plaintiffs, under the XVIIth Amendment, to have senators chosen by the people?

10. Does the pre-emption of state statutes by a private-rule-as-law here violate plaintiffs-appellants rights under the First Amendment to political expression?

NO._____

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746 F2d 97, (1st Circ. 1984).

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

(i) THE NATURE OF THE PROCEEDING AND THE STATUTORY BASIS FOR THE FEDERAL JURISDICTION

(A) The Nature of the Proceeding

This proceeding was filed in the district court as a suit to enforce an exclusive State statutory scheme which provides access to the primary ballot in Massachusetts for the candidates of all political parties. The plaintiffs, now appellants, are: an individual who was a candidate for his party's nomination for the U. S. senate in 1982 and 4 rank-and-file members of the same state party,, the

democratic, who wished to vote for him, ("Hopfmann"). The defendants are: the then chairman of the democratic state committee, the Secretary of State, who was responsible for placing names on the ballot, the Attorney General, who had responsibility for enforcing voting laws and the Constitution, and the central committee of the state party. The chairman of the state committee and the state committee are defendants because it was their enforcing of a "party rule," which the legislature had repudiated, that led to Hopfmann's being kept off the ballot so that the 4 voters could vote for him only under that burden. This private party rule, the "15 Percent rule," imposes

a requirement for ballot access which is different from, and in addition to, the requirements stated in the statutes.

Though the State statutory scheme for ballot access is exclusive in language, the contention of defendants throughout has been that the Statutory scheme does not prevent an inner group of the party from imposing an additional primary ballot access requirement. The defendants-appellees, ("the Commitee,") have argued that this additional requirement is either "added to" or "incorporated" into the statutory law "as though" it were part of the statutes. This is so, the Committee have argued because of a right of "Freedom of Association" emanating from the First

Amendment and residing in the party.

The principal requirement of the statutory scheme for primary ballot access is the collection of signatures of a specified number of registered voters, who may be of any party affiliation or even independent. In the case of a party's nomination for U. S. Senator the number of signatures required is 10,000. The 15 percent rule of the Committee requires, in addition to the statutory requirements, that the candidate attend a convention of 1/2 of 1% of the party members. The delegates at this convention are selected by caucuses which are participated in by 7.6% of the enrolled members. The rule

requires the candidate, in order to be allowed on the ballot at the fall primary, to be the endorsee of the convention, or receive the votes of at least 15 percent of the convention delegates. The Committee have argued throughout that this convention vote requirement is necessary in order that those who are involved in the convention and caucuses might have control over who party's candidates will be. In the appeals court opinion, the appeals court itself, in affirming the dismissal by the district court, brought a new argument into the case which has changed its nature. The court held that the party had authority delegated to it from the legislature to promulgate and

implement the 15 percent rule. It had been pointed out in the agreed upon facts below that the legislature had, in 1973, revoked the authority for parties to hold pre-primary endorsing conventions, an authority which had been authorized in 1962 as supplemental to the method of collecting signatures. The Committee had never argued that any such delegation existed. Yet the opinion below is based squarely on a "delegation" of power.

Plaintiffs/appellants, as required by the line of cases in the 5th circuit on elections of doubtful constitutionality, Hamer v. Campbell, 358 F2d 215, et al., attempted several times to obtain preliminary relief before the statewide

primary, held on September 14, 1982. These attempts were unsuccessful. Between the primary and general elections, the plaintiffs attempted again to obtain relief, also without success. Accordingly, Hopfmann then began, under the "necessary and further relief" clause in the complaint, to seek the setting aside of the election. This has changed the nature of the case in that it has introduced the question of whether this relief should be applied. Plaintiffs also seek damages.

(B) The Statutory Basis for the Federal Jurisdiction

United States Senate races are federal matters from start to finish,

regulated by the prescription of the legislatures of the states as delegated in Art.I,Sec.4,Cl.1,(The Times, Places and Manner Clause). The prescription of state legislatures for the times, places and manner of electing U.S. senators is pursuant to delegated federal authority. The statutes passed under this authority are, coincidentally, both state and federal law. In this case the state statutes involved, as they affect the Senate race, are both.

Hence, if the decision that there is "delegated" authority within the inner group of the state party to pass rules which can be added to the laws is correct, the 15 percent rule is state and federal

law. Its validity is a federal question. If the rule is not part of the times, places and manner of electing a U.S. senator, then the only thing it could be is a qualification under Art.I,Sec.3,Cl.3 the "Qualifications Clause" for senators. That it must be one or the other creates federal jurisdiction, not only over the rule, but also over that into which it is allegedly incorporated, the state statutes.

The XVIIth Amendment requires that the election of senators be "by the people" of each state and that the electors have the qualifications requisite for the electors of the most numerous branch of the state's legislature.

This creates a standard for regulating senatorial elections pursuant to Art.I,Sec.4, one which was not adhered to in this instance and which creates additional jurisdiction. The authority of the state under the times, places and manner clause cannot be used to create qualifications for senatorial electors which are greater than those imposed upon the electors for the lower house of the legislature. Yet here it was neccesary to be a conventioneer in order to have a vote, something not required of voters to vote for many members of the most numerous branch. This presents federal questions.

The Committee has defended its 15 percent rule, and all of the actions

pursuant to it, as empowered by the Freedom of Association. The state court proceedings upon which the Committee relies so heavily, rely upon that right. Hopfmann and his voters claim that their intertwined rights of political expression under the 1st Amendment have been violated by the rule. The parties make claims under the XIVth Amendment. Plaintiffs have asked judgment and damages under 42 U.S.C.1983 for all constitutional and federal statutory violations. The appeals court, by finding "delegation," raised a new federal issue that adds additional jurisdictional grounds: Was 28 U.S.C.1652, adhered to?

(ii) DATES BELOW

Date of entry of the order was Oct. 22,1984. Rehearing denied Dec. 10,1984. Notice of appeal filed March 8, 1985, in First Circuit in Boston.

(iii) THE STATUTORY PROVISION BELIEVED TO CONFER JURISDICTION ON THIS COURT is 28 U.S.C. 1254(2).

The court of appeals' holding pre-empts certain provisions of the statutes of Massachusetts as repugnant to the Constitution. Therefore, under the rulings of this Court, they have been found invalid. It is asserted thac the First Amendment "Freedom of Association" inheres in an inner group of a party and creates a "delegation" of authority from

the legislature to that party group. The authority "delegated" is the power to make private rules that then can be added to state election laws and become public laws though not in any statute. What makes this so unusual is that the legislature itself has on more than one occasion refused to enact such a "delegation" as the appeals court has found. In 1982 the legislature passed a bill, which died by pocket veto, specifically repudiating the authority which the party group here claims and reiterating the exclusivity of the State statutory scheme. This private lawmaking authority, then, rests solely upon the asserted federal constitutional right.

The court of appeals' finding of this unusual federal right thus pre-empts certain provisions of the State statutes in the manner discussed by this Court in Malone v. White Motor Corp., 435 U.S. 497, (1978), and by the 8th Circuit in that case, 545 F2d 599 (1976).

As thus construed, this right is not exercised by the total membership of the state party, or anything close to it. It is the right of an inner group of the party, 7.6% of the regular enrolled membership, to choose in caucuses a still smaller group, about 1/2 of 1% of the party's members, which then delegates this lawmaking authority to itself, sans benefit of legislation and in defiance of

the legislature. The party elite is arrogating power to itself which is tantamount to public lawmaking authority and the appeals court is calling it a delegation, is what it amounts to. Therefore, it goes far beyond the "Freedom of Association" as found by this Court in NAACP v Alabama, 357 US 449, and the NAACP and other leading cases on Freedom of Association. Because in those cases the organization is found to be "the apropriate party to assert these rights, because it and its members are in every practical sense identical." ibid, 459. In that case it was found that any person who was in accordance with the principles and policies of the organization could become

a member, and that the state NAACP was the medium "through which its individual members seek to make more effective the expression of their own views." loc. cit.

It is extremely important, before an organization can assert the right of Freedom of Association on behalf of its members that its "aims and interests" not be "shown to conflict with those of its members and nonmember[s of a similar class.]" NAACP v Button, 371 US 415, 443. Yet this is what we have in the present instance. A small inner group is asserting a right to promote its own interests, in the name of the organization, at the expense of the interests of the broad class of all the

members of the organization in maintaining effective and equal participation in the candidate selection process, and also at the expense of those non-members who join the party at the primary as they are allowed to do by state law. See also Harrison v NAACP, 360 US 167, 177. What the organization claiming the right of Freedom of Association must assert is the "corresponding" right of each and every member. NAACP v Button, 371 US 415, at 429; Bates v City of Little Rock, 361 US 516, 523, n. 9; Louisiana ex rel. Gremillion v. NAACP, 366 US 293, 296.

There is nothing in the concept of Freedom of Association, as developed, that indicates that the concept was meant to be

used to justify private lawmaking by a party elite which would diminish in any way the rights of the party's broad membership. The defendant-appellee State Committee is not representing the interests of all of the enrolled "regular" members of the state democratic party, as indeed it cannot. It has made no claim that all of the regular members of the party whose interests it seeks to use for justification of its positions are uniquely or even predominantly injured by the enforcement of the State statutory scheme for ballot access without the party rule. Ripon Society v National Republican Party, 525 F2d 567 (1975).

All of the foregoing directly affects

the question of whether there is a right of appeal under 28 U.S.C. 1254 (2) in this case. Although it appears that an appeal is mandatory anyway because of the specific statutory revocation of such delegated authority in 1973.

This court found in Malone that in such a "pre-emption" case the question of whether the state statutes in question are invalid under the Supremacy Clause depends upon the intent of the body originating the federal law or policy whose pre-emptiveness is at issue. ibid., at 504. In Malone, what was at issue was the supremacy of the National Labor Relations Act over a state statute regulating pension funds. "It is uncontested...that

whether the...statute is invalid depends on the intent of Congress. 'The purpose of Congress is the ultimate touchstone.' Retail Clerks v Schermerhorn, 375 U.S. 96, 103." Federal "courts normally sustain local regulation of the same subject matter unless it conflicts with or would frustrate the federal scheme, or unless the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States." loc. cit.

In the instant case, the pre-emption is by virtue of the party group's having promulgated a rule which then, because of its claimed Freedom of Association, is added to the Massachusetts election laws

and becomes a public law as well. Hence, whether there is pre-emption must be ascertained by examining the intent of the promulgators of the party rule. For their authority to add to the state statutory scheme is a federal power. The private rule is, therefore, a federal scheme of law. Where it conflicts with the state statutes, under the Supremacy Clause the state scheme must give way. Under Malone there is pre-emption lest the State statutory scheme "frustrate the federal scheme," of the party rule.

Under Malone it is also necessary to examine the totality of the circumstances surrounding the interaction between the federal and state schemes. That the

totality of the circumstances need be examined is especially important here because the state statutes in question are also themselves federal law, under the delegation to state legislatures contained in Art.I,Sec.4,Cl.1. The State statutory scheme for elections is a "prescription" of a state legislature pursuant to that clause. Oregon v. Mitchell, 400 U.S. 112, at 120, 121 (Opinion of Black, J.); United States v. Classic, 313 U.S. 299, at 315 (1941); Ex Parte Siebold, 100 U.S. 371 (1880); Ex Parte Yarbrough, 110 U.S. 651 (1884); Swafford v. Templeton, 185 U.S. 487 (1902); Wiley v. Sinkler, 179 U.S. 58 (1900), The "delegation" which the court of appeals found, on the other

hand, is not such a prescription. Because it is not an "exercise of the authority," of the legislature "in accordance with the method which the State has prescribed for legislative enactments" Smiley v. Holm, 285 U.S. 355 (1932), (Unanimous opinion by Mr. Chief Justice Hughes).

Because this state statutory scheme is delegated federal law, a federal court is obliged to examine it afresh to determime jurisdiction under 28 U.S.C. 1254 (2) as well as for the merits, and see that it complies with the rule laid down in Smiley v. Holm. The defendants-appellees have been anxious throughout this litigation to obfuscate this important truth. Their strategy seems to

be one of claiming an inherent federal right that interacts with another important federal legal scheme, i,e., that by which Congress is elected, and then claiming that the entire matter is disposed of in their favor by a state court decision which involved non-federal candidates. To this they add that a refusal by this court to review that state court decision in Langone v. Connolly, 103 S.Ct. 1510, (dissent by Stevens, Rehnquist and O'Connor) somehow resolves the questions raised in this case. So far they have found this argument pursuasive.

Although the plaintiffs-appellees have advanced Smiley arguments, the lower courts have avoided Smiley: The district court held the Art.I,Sec.4,Cl.1 issue had been disposed of by this Court's two rejections of single justice relief of a preliminary nature. (Under the doctrine of Hamer v. Campbell, 358 F.2d 215, (5th Circ. 1966), and the Deep South unconstitutional election cases, those victimized must timely seek concurrent relief or waive their right to later remedies. Bell v. Southwell, 376 F2d 659(1967), State of Alabama v. U.S., 304 F2d 583(1962)). The court of appeals held the Art.I, Sec.4, Cl.1, claims disposed of because of the legislatures' power to delegate part of

their election law authority to political parties. No delegation of power had been raised by either side up to that point. But it avoided the question of whether the delegation upon which it based its decision in any way complied with Art.I, Sec.4,Cl.1. No Massachusetts court has found such a delegation. The state courts have only found that the state statutes must be bent to "accomodate" the claimed federal right of the party inner group to add its private rules to the laws. Thus, there is no interpretation of the state law by the state's courts which supports the finding of the court of appeals. That finding rests entirely upon the federal constitutional "Freedom of Association."

What we have here is a sub rosa attempt to overturn Smiley v. Holm.

For purposes of establishing that there is jurisdiction under 28 U.S.C. 1254 (2) here, it is important to correct this obfuscation and error. Granting arguendo, for purposes of the jurisdictional argument, without acknowledging its correctness on the merits, the assertion of the court of appeals that such a "delegation" exists, it does not remove either the "delegation", or the private rule that is ostensibly "added to" the election laws of Massachusetts from having to meet the test of Smiley v. Holm, or from having to be examined independently as part of delegated federal law by this

Court for purposes of settling the jurisdictional,or any other, question.

There are no state court decisions interpreting the Massachusetts statutory scheme which support even the theory that was argued, that the State scheme can be bent to "accomodate" the asserted federal right, except Langone v. Secretary of the Commonwealth, 446 N.E. 2d 43 (Mass. 1983). Langone is based entirely on bending the language of the state statutory scheme to accomodate the alleged lawmaking power of the party inner group under its right of Freedom of Association, as a reading of that decision will clearly reveal. Unless both the delegation of the lawmaking power from the legislature to

the party and the exercise of the lawmaking power by the party inner group meet the test of Smiley v. Holm, however, the state statutes in question here must be read in the absence of the bending of them which was done by the Langone court to accomodate the allegedly "delegated" federal scheme created by the party group in its private rule.

The right of Freedom of Association is not stated in the First Amendment. It is a broad and vaguer right "emanating" from the First amendment as derived by this Court late in the day. Regardless of the overall validity and utility of such a derivative right, where it is in conflict with specific language of the Constitution

as actually written, such as that of Art.I, Sec.4, cl.1, then the vaguer right must give way, not the specific right. For the courts are bound to harmonize constitutional provisions, not seek to upset specific provisions of the Constitution. Rhode Island v. Massachusetts, 12 Pet 657. No constitutional guaranty enjoys preference and none should suffer subordination or deletion. Ullman v United States, 350 US 422. A construction nullifying a specific clause will not be given to a Constitution. Marbury v. Madison, 1 Cranch 137. No constitutional principle should be so enforced as to substantially impair another. Dick v United States, 208 US 340. The Consti-

tution is not self-destructive; in other words, the powers which it confers on the one hand it does not then take away. An authority given in express terms is not limited or restricted by subsequent provisions in the Constitution or its Amendments. Billings v. United States, 232 US 261. Qualifications of express provisions are not to be inferred. Richfield Oil Corp. v State Board of Equalization,329 US 69.

To the extent that the "delegated" authority to the state party from the legislature, which the court of appeals found, is state law "added to" the state statutes, this Court is the final arbiter of whether that delegation is a

permissible limitation upon the specific mandate of a clause such as the Times, Places and Manners Clause. Milwaukee County v White Co., 296 US 268; Williams v North Carolina, 317 US 287. The decisions of state courts are not authority binding upon the courts of the United States, even sitting in the same state, where the the questions involved and decided relate to rights arising under the Constitution of the United States. Crescent City L. S. & S. H. Co. v Butchers' Union S. H. & L. S. L. Co., 120 US 141. A Federal court is not concluded by a state court's determination of a right claimed under a Federal statute. Boyd v Nebraska, 143 US 135. Federal statutes, even when they are

delegated ones, must be interpreted by the Federal courts independently of local considerations, and cannot be said to have an established meaning, whatever the decisions of other courts may have been, until they are construed by the Supreme Court of the United States. Calhoun Gold Min. Co. v Ajax Gold Min. Co., 182 US 499. Even where the content of a federal right is determined by a state, its scope is a federal question. De Sylva v Ballentine, 351 US 570.

If then, the bending of the state statutory scheme by the state court in Langone is disregarded, as properly it must be by this Court, it can be seen that under the Rules of Decision Statute, 28

U.S.C. 1652, this Court and the lower courts are required to regard the State statutory scheme of laws regulating primary ballot access as written as rules of decision binding upon this court, with such supplementation as may be provided by applicable state court decisions as to their construction. There are no specific cases in the Massachusetts court on point except Langone. The result is that the statutes as enacted must be examined independently by this Court and given their plain meaning. They have no independent state basis. NAACP v Alabama, 357 US 449, 455. The Massachusetts cases on statutory construction generally are in accord that the statutes as written must

be adhered to. Tsongas v Secretary of the Commonwealth, 362 Mass.708,713 (1972); School Committee of Springfield v Board of Education, 362 Mass 417, 431-432 (1972).

The 1973 statute revoking authority that previously actually was delegated does not require this disregarding, since no state court ever attempted to bend it to accomodate the asserted federal right of the party to add to the laws. Nor did the court of appeals attempt to hold that it could be interpreted in any fashion so as to ignore its plain meaning. 1973 Mass. Acts c 429: AN ACT REPEALING THE LAW PROVIDING FOR PRE-PRIMARY CONVENTIONS OF POLITICAL PARTIES.

The authority revoked by this law was supplemental to the method of nomination papers as it stood before, during and after, and still stands today. Nor did that authority exclude the non-endorsee or any other who collected their signatures and had them certified. These statutes are the rules of decision here.

The other branch of a Malone analysis is the legislative history of the federal scheme of law, the intent of its promulgators: The 15 Percent Rule was propounded as part of the Party Charter at a Charter Convention in 1979. The parties have agreed on certain facts surrounding this convention and the development of the rule: One reason for the convention was

to restore the pre-primary convention and strengthen its authority. The legislative history was brought out by documents circulated and used at that convention. One was entitled: DEMOCRATIC COMMISSION DRAFTS PARTY CHARTER, by Jerome M. Milheur, chairman of the Amherst Democratic Committee, associate professor of political science, University of Massachusetts, and member of the 25-person Charter Commission that preceded the convention. It said: (p.2) "The proposed charter restores the state convention, which was abolished in 1972 by a Democrat-controlled state legislature... Many local democrats attributed the deterioration of town and ward committees

to the elimination of state conventions; and former House Speaker, David Bartley, at a recent state party gathering...called the vote to repeal the convention, taken during his tenure as Speaker, a`mistake.'" Another document included by agreement in the legislative history of the rule was an article that circulated at the convention by two professors from the University of Michigan-Ann Arbor, Dobel and Stockton, entitled "Unreforming the Parties." As its title indicates it advocates a return to the good old days of bossism, smoke-filled rooms, and inside control. A single quote will epitomize: (p. 30) "First, all party decisions relating to policy and candidates should be made by

conventions at which no more than one half of all delegates are chosen by primaries." Another document from Professsor Milheur is in the agreed upon history, entitled: "Statement of Jerome M. Milheur, Chairman, Amherst Democratic Town Committee," it states: (p. R-54) "I want to urge a return to the pre-primary endorsement convention. And I want to urge that its actions be given greater weight as to eventual party nominations." An "Important Notice" was circulated at the convention, also part of the agreed history, on the letterhead of the defendant State Committee, bearing the name of defendant Chairman Atkins, which stated: There is a distinct possibility... that a Party Charter will be held to

supersede state law." The notice then referred to Marchioro v Chaney, 442 US 191, then pending. It was agreed below that the convention discussed but did not resolve whether the superseding of state law would require legislation.

So the rule was intended from the outset to reverse the 1973 revocation of convention authority and supersede state law, as well as disenfranchise the primary. The "accomodation" idea came later, after Chairman Atkins tried and failed to get a number of bills through the democrat-controlled legislature. The original intention was to supersede, and so it remains, despite all the semantical games. No jurist has attempted to bend or

accomodate Mass.Acts 1973 c.439 to suit these later maneuverings, so the intent of the Rule to reverse the withdrawal of authority stands unquestioned. The rule, if valid, pre-empts the statute.

The result is no different with the excluding language of the State statutory scheme for ballot access the "method of nomination papers," if we set aside, in line with the points and authorities above, the attempt to hide the claimed federal right behind a pendente lite state court decision. Mass.Gen.Laws, Ch.53: Sec.2: "no candidate shall be nominated ...in any other manner than is provided in this chapter..." Sec.44: "The nomination of candidates for nomination at state

primaries shall be by nomination papers. In the case of...United States senator, nomination papers shall be signed in the aggregate by at least ten thousand voters" Ch. 54: Sec.41:" Ballots for the use of voters in a voting precinct, polling place, or town hall shall contain the names of all caandidates duly nominated for election therein." This is clearcut state and federal law. Neither the 15 Percent Rule nor the "delegation" discovered by the appeals court comply with Smiley in having been enacted by the legislature in the way that it normally enacts laws. If this clear language that was enacted in accord with Art.I,Sec.4,is to be bent or "accomodated," it can only

be by pre-emption. No state court has the authority to override the dictate of the Times, Places, and Manner Clause unless there is a superior federal constitutional right. The finding below is a pre-emption of these state statutes.

Similarly, Ch.53, Sec. 28 sets "State primaries" for the seventh Tuesday preceding biennial state elections. Like most states Massachusetts has a body of laws and regulations governing the actual conduct of the voting at the polling places. However, if, as here, there are only two statutorily qualified candidates, and one is excluded from the ballot and chooses not to conduct a write-in, then the quest for the nomination and the

primary are over. Under 2 U.S.C.431 a convention that has authority to nominate a candidate is a primary. The court of appeals has held that the convention had the authority to exclude Hopfmann from the ballot, ending his quest unless he should try a write-in candidacy against Kennedy. That was tantamount to nomination for Mr. Kennedy. An insider convention is a different place from the polling place at a statewide primary, and only a state legislature, acting pursuant to Art.I, Sec.4,Cl.1, can change the place of electing a senator. So the 15 Percent Rule has pre-empted Sec.28 as well.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS THAT THE CASE INVOLVES

Amendments I, XIV, XVII. Art.I,Sec.3,Cl.3 and Sec.4,Cl.1. 42 USC 1983, 28 USC 1652, The 15 Percent Rule. Mass. Gen. Laws, Chpt. 53, Secs. 2,6,10, 44, 48, Chpt. 54, Sec. 28.(Lawyers Co-op Auth. Ann. Ed.) Mass. Acts 1973 439 Former Secs. 54,54C and 54D of Chapt. 53. 2 U.S.C. 431.

STATEMENT OF THE CASE

In the 1982 democratic primary for Edward Kennedy's senate seat, Hopfmann was a candidate. In June Hopfmann qualified to be on the fall primary ballot under the statutes. He submitted his signatures on May 25, 1982, and was notified that his name would not be placed on the ballot by

Connolly, the Secretary of State, because of the 15% Rule. Four voters who wished to vote for Hopfmann on the ballot then filed with him as plaintiffs in this suit. There has been no question of Hopfmann's not having complied with the statutes. This suit sought injunctive relief for access to the ballot for the September primary.

In '82 only two Democrats qualified for the democratic senate primary-- Hopfmann and Kennedy. Hopfmann attended the May pre-primary convention where the 15 Percent Rule was first applied, under protest as to its constitutionality, but got only 2 %. Kennedy was the endorsee. This left Kennedy the only candidate for

the Senate nomination on the primary ballot. 31 % of the Democrats voting in September voted a blank rather than vote for Kennedy. Hopfmann and his fellow plaintiffs pleaded a general "further relief" clause and, since the primary, have, under that clause, been seeking the voiding of the primary election and a new special election as required by the rule of the Deep South unconstituional election cases.

In 1982 the Massachusetts legislature passed a bill to reaffirm the statutory method of nomination papers and repudiate the 15 percent rule. The governor sent it to the Supreme Judicial Court(SJC) for an advisory opinion. The SJC refused to

answer the governor's question about the necessity for the bill and whether the 15 percent rule superseded state statutory law but answered his question about the new bill, opining that its reaffirmation of the method of nomination papers would interfere with the party's lawmaking right under the Freedom of Association. The governor let the bill die. It had been preceded by a number of bills seeking enactment of the 15 percent rule into statutory law but they died in the legislature. The SJC AO was cited by Connolly in keeping statutorily qualified candidates off the ballot.

Several state lt. governor candidates were excluded from the ballot along with

Hopfmann. Two also filed suit, and one persisted, Langone, who ultimatelly went all the way to this Court, seeking an appeal or cert. Langone, supra. Along the way the lower courts in this case have frequently deferred to that state litigation and the court of appeals holding is based in large part on a cursory acceptance of it as controlling.

For this and other reasons, Hopfmann has come to emphasize, as the litigation has developed, the decision of this Court in Smiley v Holm, supra, which holds that the "prescription" of state legislatures under the Times, Places and Manner Clause is the normal procedure which the state follows in making its laws. It is the

position of Hopfmann that the party rule which is here claimed to be "added to" the laws does not comply with Smiley. The lower courts have not addressed the questions posed by Smiley, though their disposition of this case appears to squarely overrule it without comment. The Committee have relied heavily throughout on the holding of this Court in The Democratic Party of the U.S. v Wisconsin, 450 US 107 (1981), and its predecessor, Cousins v Wigoda, 419 US 477 (1975). They argue that the Freedom of Association recognized in Democratic Party, under which a national party's rules for selection of delegates to a presidential nominating convention may override a state

law that permits non-party members to vote in an election determining the delegates, extends to a national legislative race and to a confrontation between a state party rule promulgated by an inner group and a State statutory scheme. Their argument is that since the party rule is a federal right the State statutory scheme must be bent to accomodate it, but that we must not look at the federal justification for this "accomodation" because examination of it is foreclosed by Langone since it is really only a matter of a state court's interpretation of state law.

The court of appeals has gone beyond the arguments and the holdings of the district and state courts. Of its own

volition, it has based its affirmance of the district court on a holding that the Massachusetts legislature has "delegated" to the party group which promulgated the 15 Percent Rule the authority to do so, but that that "delegation" is empowered by the First Amendment Freedom of Association and is the exercise of a paramount federal right, although inquiry into that federal right is foreclosed by this Court's denial of cert or appeal in Langone, which only involved state candidates.

Argument

Both courts are straddling the truth. Their opinions are internally logically inconsistent. There cannot be a basic federal right that is protected by state

law and state courts from the light of federal standards and scrutiny.

There is no such thing as a federal constitutional right to private lawmaking authority which enables a political party to add to laws. If a private organization has a right protected by the Constitution it is paramount over state law that infringes upon that right. This is simply the Supremacy Clause. Nothing in the Constitution empowers the holder of a federally protected right to supplant the function of a legislature at will. To hold otherwise, as the court of appeals has done, is to deprive the legislatures of the states of practical control over their own lawmaking. The reinterpretation,

by a state court, of a state statutory scheme, in order to "accomodate" such a nonexistent right, is a nullity. It is not a question of interpretation of a state statute with which federal courts shouldn't interfere. There wasn't any question about the plain meaning of these statutes before this imaginary right was asserted. Whether such an asserted federal right exists is a federal question. The question of whether the Freedom of Association, which has heretofore been held up as a shield by this Court to protect and enhance the cluster of rights stated in the First Amendment, can now be radically extended to allow not just protective association,

but independently exerted participation in the legislative process, is itself a federal question. It does not become a state question because the legislature whose laws are ostensibly being added to is a state one.

The only delegation of federal lawmaking authority which exists here is that of Art.I,Sec. 4, Cl.1, which the courts keep sidestepping. The unanimous interpretation of the meaning of that clause in Smiley, supra, controls. The regulation of U.S. senate races shall be done by state legislatures in the normal course of their lawmaking just like they make all other laws.

Nor is the question decided by this

Court's refusal to grant cert and/or hear an appeal in Langone, supra. This court can now decide whether its refusal is dispositive as asserted. We submit that it is not. The court of appeals equates a state candidacy to a federal legislative candidacy and that is not an apt equation. U.S. senate races are federal matters, regulated by prescription of legislatures coincidentally with their regulation of races for state offices, yes, but federal matters nonetheless. This means that the First and XIVth Amendment questions cannot be separated out from the Times, Places and Manner Clause questions so as to be equatable with the First and XIVth Amendment questions in Langone. Disparate

treatment in election laws, of individuals equally situate, must be the result of lammaking procedures which comply with Smiley or else there is ipso facto a violation of the equality clause. A delegation of authority to a legislature presupposes that any disparate treatment accorded by the lawmaking authority thus delegated will be subject to safeguards of the legislative process, such as requirements for reasonable classification and due deliberation. The 15 Percent Rule divides the registered democrats into separate classes that didn't exist before. The moment that a convention winnows out even one candidate who is qualified under the method of nomination papers, an

inequality that wasn't there before has begun; the votes of these inner groups have acquired more weight than the votes of those who are regular members but didn't attend the caucuses or convention. In the case, as obtains here, where there are only two candidates and one loses at the pre-primary convention by ballot exclusion, the mass of the rank-and-file will be disenfranchised. Here the legislature's rejected such inequality. So the violation of the Times, Places and Manner Clause also violates the Equality Clause of the XIVth Amendment, since the Times, Places and Manner Clause controls the only legal way in which such schemes of classification can be imposed in the

law regulating national legislative races.

All we have, on p.7 of the opinion, is the statement that "an examination reveals" that the 1st Amendment claims of Hopfmann and his voters were disposed of by this Court's rejection of Langone, but no examination. How does a right that is supposed to be exerted by an organization on behalf of all of its members, become a "right" whose avowed purpose is to restore the power of party inner cadres over the rank-and-file? This is a right of dis-association, not association, a control, not a protection.

The arguments of the plaintiffs-appellants on the Times, Places and Manner Clause and the Qualifications Clause are

related directly to their First Amendment claims, which have been ignored. These two clauses were intended to prevent what is going on here. The Qualifications Clause was to prevent "faction," leading toward oligarchy and aristocracy. Our modern equivalents include party elitism. The intent was to prevent candidate control by an inner group. Comments of James Madison in the constituional debates Powell v McCormack, 395 US 486 (1969), at 533-534. The Times, Places and Manner Clause was intended to place the regulation of races for the national legislature in the hands of state legislatures as being closest to the people. Madison's statement in Farrand,

Records of the Federal Convention, Vol. 3, p.311, as quoted U.S. v Gradwell, 243 US 476, 484. The passage of the XVIIth Amendment was consciously an extension of this intent and purpose to senate races. It sets the standard by which both the First Amendment claims and the XIVth Amendment claims must be measured: "by the people." It is the standard by which the prescription of the legislatures for senate races is to be measured. If this Court allows Smiley v Holm to be silently stilettoed, all of these safeguards will bear the wound.

There is no independent non-federal ground that was relied on here, that this Court should defer to, not at any level,

not by the state court, not by Mr. Atkins in pushing the rule, not by the courts below. But such there must be before the matter is disposed of by Langone, supra. NAACP v Alabama, supra, at 455. The non-federal ground claimed must have "fair or substantial support," Ward v County Commisioners, 253 US 17,22. The non-federal ground must "independently and adequately support ...the judgment." Abie State Bank v Bryan, 282 US 765, 773.

Party conduct of primaries is a state function, not a private one; Freedom of Association, a private right, doesn't apply. Smith v Allwright, 321 US 649 (1944); Storer v Brown, 415 US 724 (1974). A private right is not a public control.

REASONS WHY THE QUESTIONS PRESENTED ARE SO SUBSTANTIAL AND REQUIRE FULL CONSIDERATION

The unanimous decision of this Court in Smiley v Holm, supra, will be overturned without having even been addressed.

The First Amendment Freedom of Association will have been converted from a shield protecting private associational rights that enhance expression and communication to a sword with which private associations can wield public lawmaking authority, authority that invalidates statutory enactments by private fiat, without any of the safeguards of the legislative process.

The control of legislatures, state and national, over their own lawmaking

authority, will have been seriously compromised and will eventually be lost.

Party elites will be able to disenfranchise their own rank-and-file. A 15 Percent Rule could as easily be a 95 Percent Rule, or a Rule for favored incumbents, or their favorites.

One man-one vote will have been rendered meaningless, since candidate control will be utilizable to obtain control of the electoral process by a favored elite.

Both the federal system and the system of checks and balances will have been rendered meaningless, since party elites, state and national, will have lawmaking power but will be subject to

neither system.

The Qualifications Clause and the XVIIth Amendment will be will be bypassable by private lawmaking.

Party elites will exercise state functions without state control.

WE ASK FOR PLENARY CONSIDERATION.

Respectfully submitted,

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CERTIFICATE OF SERVICE
UNDER RULE 28

I hereby certify that I am a member of the bar of this Court, and that I have served, by United States mail, first class, postage prepaid, this 11th day of March, 1985, true and accurate copies of this Jurisdictional Statement upon Alexander Gray, Jr., Esq., Assistant Attorney General, One Ashburton Place, Room 2001, Boston, Mass. 02108, counsel of record below for defendants-appellees Secretary of State Connolly and Attorney-General Bellotti, 3 copies for each defendant, and on Keith Long, Esquire, Herrick and Smith, 100 Federal Street, Boston, Mass., 02110, counsel of record below for defendants-appellees Chester G. Atkins and the Democratic State Committee of Massachusetts, 3 copies for each defendant.

Laurence A. Elgin

Rule 28 4(c) Statement

Note: The court below has not certified to the state Attorney-General that the statutes of his state are drawn in question,for obvious reasons.